

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NELSON RAY McKEE,

Defendant.

3:15-cr-007-RCJ-VPC

**ORDER**

A grand jury has indicted Defendant Nelson Ray McKee, an Indian, on one count of Murder Within Indian Country, 18 U.S.C. §§ 1111, 1151, and 1153. Defendant has made eight motions in preparation for trial (ECF Nos. 15–22). For the reasons stated below, the Court grants the motions in part and denies the motions in part.

**I. FACTS AND PROCEDURAL HISTORY**

On December 31, 2014, Jason Manard, an officer for the Bureau of Indian Affairs, accompanied by Casey Negus and Kyle Negus, deputies for the Humboldt County Sheriff's Office, responded to an emergency call on the Fort McDermitt Indian Reservation. (Narrative, 4, 6, ECF No. 41-1; Incident Report, 3, ECF No. 41-2). The caller told the dispatcher a woman was pounding on the door and appeared to have been stabbed in the chest. (*Id.*) When the officers

1 arrived at the scene, they found Cheryl Jackson-McKee on the floor of the entry way “flailing  
2 about weakly and moaning.” (Incident Report, 3). “She had blood on her left cheek” and “a  
3 wound in her upper left chest that was bleeding quite a bit.” (*Id.*) The officers decided to find  
4 Jackson-McKee’s husband, Defendant Nelson McKee, at the McKee residence located about  
5 eighty yards from the scene. (Narrative, 4, 6; Incident Report, 3). As the officers walked toward  
6 the house, they noticed fresh footprints in the snow leading from the McKee residence to the  
7 scene. (*Id.*) The footprints passed through an open gate separating the two residences, and the  
8 officers observed drops of blood on the snow by the gate. (*Id.*) When they approached the door  
9 of Defendant’s home, Officer Manard noticed drops of blood at the base of the door’s exterior.  
10 (Incident Report, 3).

11 The officers knocked on the door twice, and Defendant opened the door about forty-five  
12 seconds after the first knock. (Body Camera Video One of Deputy Kyle Negus (“Video”), DVD  
13 Bates No. USAO 00896, FILE0078, 22:21:21–22:22:06, ECF Nos. 40, 42). Officer Manard  
14 asked, “What’s going on?” and Defendant replied, “Nothing.” (*Id.* at 22:22:08). Officer Manard  
15 asked Defendant twice, “Why is Cheryl bleeding?” and said to him, “Cheryl’s over there  
16 bleeding right now; we’re trying to figure out why—did she fall over again or did something  
17 happen?” (*Id.* at 22:22:10–24). Amidst these questions, Deputy Kyle Negus asked, “Can we  
18 come in the house?” (*Id.* at 22:22:15). According to Officer Manard, he also asked for consent to  
19 enter and Defendant “invited us inside,” (Incident Report, 3), by saying “something to the effect  
20 of ‘come on in.’” (Hr’g, January 11, 2016, 14:50:53). The body camera Deputy Kyle Negus was  
21 wearing shows Defendant moved out of the doorway, and the officers entered the house. (Video,  
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1 22:22:30). Defendant then sat at a table where the officers observed a large bottle of whiskey and  
2 two knives, one of which appeared to be bent and the other appeared to have blood on it.  
3 (Incident Report, 3). The officers moved the knives from the reach of Defendant, ordered him to  
4 stand up, handcuffed him because he was balling up his fists, and had him sit down. (*Id.* at 3–4).

5 While Defendant was detained, Officer Manard asked many questions of Defendant and  
6 made statements to him, such as the following:

- 7 • “Why is there a bloody knife on your table?”
- 8 • “Nelson, what the hell happened?”
- 9 • “Cheryl’s over there bleedin’; I’ve got a knife with blood all over it; I’ve got you  
10 sitting next to it.”
- 11 • “Nelson, I need you to talk to me right now; what the fuck happened, dude?”
- 12 • “Nelson, seriously, what happened?”
- 13 • “Nelson, you’re not under arrest right now, I’m trying to figure out what the fuck  
14 happened.”
- 15 • “Nothing? Something happened, Nelson, she’s over there bleeding.”

16 (Video, 22:23:53–22:25:20). While the deputies searched the house for other occupants and  
17 found none, (*Id.* at 22:24:50–22:26:30), Officer Manard continued his questions and statements,  
18 including the following:

- 19 • “Why the fuck is she bleeding?”
- 20 • “You two didn’t get in an argument?”
- 21 • “Did you cut her or did she cut herself?”
- 22 • “Did you watch her do it?”

23 (*Id.* at 22:26:33–22:30:00). During that exchange, Deputy Casey Negus was examining and  
24 reading papers on a table in the room. (*Id.* at 22:27:15–22:28:40).

1       The officers then placed Defendant under arrest for unlawful possession of alcohol. (*Id.*  
2 at 22:29:15–22:30:10). Because they had observed blood on his socks, they removed them and  
3 placed them in an evidence bag. (Narrative, 4; Incident Report, 4). As the officers prepared to  
4 transport Defendant to jail, Defendant stated, “[Jason Manard] has tried me in federal court two  
5 times . . . probably will be his third time he tries me,” and Deputy Kyle Negus replied, “What  
6 would he try and try you for this time? Why would he take you to court this time?” (Video,  
7 22:38:00–22:39:20).

8       The next day, January 1, 2015, FBI agents obtained a search warrant and seized evidence  
9 from Defendant’s home. (Mot. to Suppress, 2, ECF No. 22). Agents also interviewed Defendant  
10 while he was in jail. At 5:57 p.m., Defendant invoked his right to have an attorney present, and  
11 the interviewer ceased the interrogation. (Tr. 2–3, ECF No. 39-3). However, Defendant  
12 “continued to ask questions about the circumstances of his arrest and [was] told that the  
13 interviewing Agents could not respond.” (Doc, 1, ECF No. 39-4). At 6:18 p.m., Defendant stated  
14 that he wanted to speak with the agents and confirmed that the agents had not asked to continue  
15 the conversation after Defendant had asked for an attorney. (Tr. 2, ECF No. 39-5). Defendant  
16 said he had changed his mind. (*Id.*) The officers then re-read Defendant’s *Miranda* rights to him,  
17 and Defendant initialed and signed a waiver form. (*Id.* at 3; Waiver Form, ECF No. 39-5).

18       Defendant has made the following eight motions: (1) motion for notice of intent to  
19 introduce evidence under FRE 404(b); (2) a *Henthorn* motion; (3) motion to strike surplusage  
20 from the indictment; (4) motion to use the Elko Division Master Jury Wheel; (5) motion to  
21 permit attorneys to ask further questions of jurors under Rule 24(a); (6) motion to use a case-

specific jury questionnaire; (7) motion to suppress statements for Fifth Amendment violations; (8) motions to suppress evidence for Fourth Amendment violations.

**II. MOTION FOR NOTICE OF INTENT TO INTRODUCE EVIDENCE UNDER FRE 404(b)**

Defendant asks the Court to order the Government to provide thirty days' notice of any evidence it intends to introduce at trial under Rule 404(b) (ECF No. 15). At a defendant's request, Rule 404(b) requires a prosecutor to give "reasonable notice" of its intent to offer evidence of "a crime, wrong, or other act" for a permissible use, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b). The Government does not oppose the motion, and the Court finds thirty days to be reasonable. The Court grants the motion and orders the Government to provide thirty days' notice of any evidence it intends to introduce at trial under Rule 404(b). In addition, the Government shall provide prompt notice if it discovers any such evidence within thirty days of trial.

**III. HENTHORN MOTION**

Defendant moves the Court to order the Government to inspect and produce the personnel files of all federal agents and officers it intends to call as witnesses at trial (ECF No. 16). When a defendant requests access to the personnel files of testifying officers for the purposes of identifying exculpatory information, i.e., impeachment information, the government must examine the personnel files itself and disclose any material information that is favorable to the defendant. *United States v. Henthorn*, 931 F.2d 29, 30–31 (9th Cir. 1991); *see also Giglio v.*

1 *United States*, 405 U.S. 150, 154–55 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). If the  
2 prosecution is uncertain as to whether the information is material, “it may submit the information  
3 to the trial court for an in camera inspection and evaluation.” *Henthorn*, 931 F.2d at 31 (quoting  
4 *United States v. Cadet*, 727 F.2d 1453, 1467–68 (9th Cir. 1984)). A defendant has no burden to  
5 make an initial showing of materiality; the mere demand to produce the files triggers the  
6 government’s duty to examine the files. *Id.* However, the attorney assigned to a case need not  
7 personally review the files. *United States v. Jennings*, 960 F.2d 1488, 1491–92 & n.3 (9th Cir.  
8 1992). Following its examination, the prosecution need not furnish the files “to the defendant or  
9 the court unless they contain information that is or may be material to the defendant’s case.”  
10 *Henthorn*, 931 F.2d at 31.

11 Contrary to *Henthorn*, Defendant asks the Court to order the Government to produce the  
12 files of all agents and officers the Government intends to call as witnesses at trial. *Henthorn*  
13 requires the prosecution to furnish only files it believes “contain information that is or may be  
14 material to the defendant’s case.” *Id.* Thus, the Court grants the motion inasmuch as it requires  
15 the Government to review personnel files and furnish those it believes may contain material  
16 information, an obligation with which the Government has indicated it intends to comply. (*See*  
17 *Resp.*, 3, ECF No. 37). The Court denies the motion inasmuch as Defendant’s request exceeds  
18 the Government’s obligations as identified in *Henthorn*.

#### 19 **IV. MOTION TO STRIKE SURPLUSAGE FROM INDICTMENT**

20 Defendant moves to strike as surplusage the words “willfully and” from the indictment  
21 (ECF No. 17). Under federal rules, “[u]pon the defendant’s motion, the court may strike  
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1 surplusage from the indictment or information.” Fed. R. Crim. P. 7(d). The purpose of this rule is  
2 “to protect a defendant against prejudicial or inflammatory allegations that are neither relevant  
3 nor material to the charges.” *United States v. Laurienti*, 611 F.3d 530, 546–47 (9th Cir. 2010)  
4 (quoting *United States v. Terrigno*, 838 F.2d 371, 373 (9th Cir. 1988)).

5 The indictment contains the following language: Defendant “willfully and with malice  
6 aforethought, did unlawfully kill [the victim].” (ECF No. 1). Defendant argues the indictment  
7 charges murder in the second degree, not in the first degree, because although it includes the  
8 term “willfully” it does not contain the phrase “with premeditation.” As a result, Defendant asks  
9 the Court to strike “willfully and” from the indictment to eliminate confusion. The Government  
10 does not oppose the motion. (Resp., 1, ECF No. 27).

11 The Government agrees that the indictment charges Defendant with murder in the second  
12 degree, not in the first degree. The phrase “willfully and” is neither relevant nor material to the  
13 charge of second-degree murder; thus, the Court grants the motion in the interest of protecting  
14 Defendant from prejudicial allegations and avoiding jury confusion.

#### 15 **V. MOTION TO USE ELKO DIVISION MASTER JURY WHEEL**

16 Defendant asks the Court to use the Elko Division Master Jury Wheel for jury selection  
17 to avoid excluding from the jury pool “the very distinct and sovereign Indian Country Political  
18 Community (the Fort McDermitt Pa[ui]te-Shoshone Tribe of Nevada and Oregon) from which  
19 the alleged crime arises.” (Mot., 7, ECF No. 18). Defendant points out that in a prior criminal  
20 case involving Defendant the Court granted Defendant’s motion to use the Elko Division Master  
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1 Jury Wheel. *See United States v. McKee*, 3:09-cr-048-ECR-RAM, ECF Nos. 20, 40. The  
2 Government does not oppose the motion. (Resp. 1, ECF No. 28). The Court grants the motion.

3 **VI. MOTIONS TO PERMIT ATTORNEYS TO ASK FURTHER QUESTIONS OF**  
4 **JURORS UNDER RULE 24(a) AND TO USE A CASE-SPECIFIC JURY**  
5 **QUESTIONNAIRE**

6 Defendant moves the Court to permit the attorneys to examine prospective jurors under  
7 Federal Rule of Criminal Procedure 24(a) (ECF No. 19) and to use a case-specific questionnaire  
8 as part of voir dire (ECF No. 20). The Court denies both motions.

9 Prior to trial, the parties will have the opportunity to submit to the Court proposed voir  
10 dire questions. The Court will review the proposed questions and determine whether to pose  
11 them to prospective jurors at the time of jury selection. The Court's questioning during voir dire  
12 will provide sufficient constitutional safeguards to ensure that a fair and impartial jury is  
13 selected.

14 **VII. MOTION TO SUPPRESS STATEMENTS**

15 Defendant moves to suppress statements he made while in his home and in jail for  
16 violations of the Fifth Amendment (ECF No. 21). The Court grants the motion in part and denies  
17 the motion in part.

18 **A. Legal Standards**

19 The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal  
20 case to be a witness against himself." U.S. Const. amend. V. To secure this privilege against self-  
21 incrimination, "the prosecution may not use statements, whether exculpatory or inculpatory,  
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1 stemming from the custodial interrogation of the defendant unless it demonstrates the use of  
2 procedural safeguards,” including the use of specific warnings.<sup>1</sup> *Miranda v. Arizona*, 384 U.S.  
3 436, 444 (1966). “The defendant may waive . . . these rights, provided the waiver is made  
4 voluntarily, knowingly and intelligently.” *Id.*

5 A person is “in custody” for the purposes of *Miranda* if there was “a formal arrest or  
6 restraint on freedom of movement of the degree associated with a formal arrest.” *Thompson v.*  
7 *Keohane*, 516 U.S. 99, 112 (1995) (citations omitted). In other words, “given th[e]  
8 circumstances, would a reasonable person have felt he or she was not at liberty to terminate the  
9 interrogation and leave.” *Id.*; see also *United States v. Medina-Villa*, 567 F.3d 507, 519 (9th Cir.  
10 2009) (“The subject of the inquiry is ‘whether a reasonable innocent person in such  
11 circumstances would conclude that after brief questioning he or she would not be free to leave.’”  
12 (quoting *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir.1981))). A person can be in  
13 custody in his or her own home, *Orozco v. Texas*, 394 U.S. 324 (1969) (a defendant questioned  
14 in his bedroom by four officers was “in custody”), but “[a]n interrogation conducted within the  
15 suspect’s home is not *per se* custodial,” *United States v. Craighead*, 539 F.3d 1073, 1083 (9th  
16 Cir. 2008). To determine whether an in-home interrogation was custodial, the courts “consider[]

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18 <sup>1</sup> As spelled out in *Miranda*:

19 [A defendant] must be warned prior to any questioning that [1] he has the right to  
20 remain silent, [2] that anything he says can be used against him in a court of law,  
21 [3] that he has the right to the presence of an attorney, and [4] that if he cannot  
22 afford an attorney one will be appointed for him prior to any questioning if he so  
23 desires.

24 *Id.* at 479.

1 the extent to which the circumstances of the interrogation turned the otherwise comfortable and  
2 familiar surroundings of the home into a 'police-dominated atmosphere.'" *Id.* at 1083. This  
3 determination "'is necessarily fact intensive,'" *id.* at 1084 (quoting *United States v. Griffin*, 7  
4 F.3d 1512, 1518 (10th Cir. 1993)), and can include, among other factors, the following:

5 (1) the number of law enforcement personnel and whether they were armed; (2)  
6 whether the suspect was at any point restrained, either by physical force or by  
7 threats; (3) whether the suspect was isolated from others; and (4) whether the  
8 suspect was informed that he was free to leave or terminate the interview, and the  
9 context in which any such statements were made.

10 *Id.*

11 "Interrogation" for the purposes of *Miranda* means "express questioning" and "any  
12 words or actions on the part of the police (other than those normally attendant to arrest and  
13 custody) that the police should know are reasonably likely to elicit an incriminating response  
14 from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980). "General on-the-scene  
15 questioning as to facts surrounding a crime" is not "interrogation." *Miranda*, 384 U.S. at 477–78.  
16 Volunteered statements that are not made in response to interrogation are admissible, however,  
17 even when a suspect is in custody and after he invokes his rights. *Klamert v. Cupp*, 437 F.2d  
18 1153, 1154 (9th Cir. 1970) (citing *Miranda*, 384 U.S. at 478). Once a suspect unambiguously  
19 requests counsel, *Davis v. United States*, 512 U.S. 452, 459 (1994), "the interrogation must cease  
20 until an attorney is present," *Miranda*, 384 U.S. at 474. If a defendant's "'right to cut off  
21 questioning' was 'scrupulously honored,'" *Michigan v. Mosley*, 423 U.S. 96, 104 (1975), a  
22 defendant can subsequently waive that right if "the accused himself initiates further  
23 communication, exchanges, or conversations with the police," whereas a waiver is invalid when  
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1 a defendant merely “respond[s] to further police-initiated custodial interrogation even if he has  
2 been advised of his rights.” *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

3 *Miranda* warnings are not required “when ‘police officers ask questions reasonably  
4 prompted by a concern for the public safety.’” *Allen v. Roe*, 305 F.3d 1046, 1050 (9th Cir. 2002)  
5 (quoting *New York v. Quarles*, 467 U.S. 649, 656 (1984)). This public-safety exception applies  
6 when there is “‘an objectively reasonable need to protect the police or the public from immediate  
7 danger.’ That is, the police must reasonably believe that there is a serious likelihood of harm to  
8 the public or fellow officers.” *Id.* (quoting *United States v. Carrillo*, 16 F.3d 1046, 1049 (9th Cir.  
9 1994)). Further, “[t]here is no custodial interrogation when asking what happened in an  
10 emergency situation.” *Vickers v. Stewart*, 144 F.3d 613, 616–17 (9th Cir. 1998).

11 A defendant’s statements to police must be made voluntarily. *Miranda*, 282 F.3d at 461–  
12 62. “A confession made in a drug or alcohol induced state . . . may be deemed voluntary if it  
13 remains ‘the product of a rational intellect and a free will.’” *United States v. Banks*, 282 F.3d  
14 699, 706 (9th Cir. 2002), *rev’d on other grounds*, 540 U.S. 31 (2003) (quoting *Medeiros v.*  
15 *Shimoda*, 889 F.2d 819, 823 (9th Cir.1989)). Factors to consider when determining the  
16 voluntariness of statements include the defendant’s general demeanor and whether the defendant  
17 was able to obey the officers’ orders and instructions, answer questions, cooperate in conversing  
18 with the officers, and understand the circumstances. *Id.*; *Medeiros*, 889 F.2d at 823.

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1           **B.       Analysis**

2           Defendant asks the Court to suppress statements he made on two separate occasions: (1)  
3 statements made in his home on December 31, 2014; and (2) statements made in jail in  
4 Humboldt County on January 1, 2015.

5           **1.       Statements Made in Defendant's Home on December 31, 2014**

6           Defendant was not in custody for purposes of *Miranda* when the officers initially  
7 knocked on his door and conversed with him. Three officers knocked on the door of Defendant's  
8 home and asked him several questions. (Video, 22:22:08–22:22:24). Defendant was home alone,  
9 and the officers did not inform him he was free to terminate the interview, *id.*; however, the  
10 atmosphere was initially not “police-dominated.” Before the officers entered, they exhibited no  
11 forceful, intimidating, or aggressive behavior. For example, they did not restrain Defendant or  
12 yell at him. Indeed, they were respectful of Defendant and did not use an accusatory or  
13 demanding tone in speaking with him. A reasonable person in these circumstances would feel  
14 free to terminate the encounter. However, shortly after the officers entered Defendant's home,  
15 they saw two knives on the kitchen table where Defendant was seated, and quickly required  
16 Defendant to stand up, handcuffed him, and then made him sit down. (*Id.* at 22:22:30–22:24:05;  
17 Incident Report, 3–4). Thus, at this point, just seconds after the officers entered Defendant's  
18 home, he was in custody for purposes of *Miranda*.

19           Throughout the interaction between the officers and Defendant, the officers engaged in  
20 express questioning they knew would be “reasonably likely to elicit an incriminating response  
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1 from the suspect.” *Innis*, 446 U.S. at 300–01. For example, they asked the following questions of  
2 Defendant:

- 3 • “Why is Cheryl bleeding?”
- 4 • “Did she fall over again, or did something happen?”
- 5 • “Why is there a bloody knife on the table?”
- 6 • “I need you to talk to me; what the hell is going on? Why is there a bloody knife on  
the table?”
- 7 • “Nelson, I need you to talk to me right now; what the fuck happened, dude?”
- 8 • “Nelson, seriously, what happened?”
- 9 • “You two didn’t get in an argument?”
- 10 • “Did you cut her or did she cut herself?”
- 11 • “Did you watch her do it?”
- 12 • “Then how do you know she cut herself?”
- 13 • “What would [Officer Manard] try and try you for this time? Why would he take you  
to court this time?”

14 (Video, 22:22:10–22:27:00; 22:38:40–22:39:20). Any officer would know these types of  
15 questions would likely elicit an incriminating response, along with the following statements the  
officers made:

- 16 • “Cheryl’s over there bleeding; I’ve got a knife with blood all over it; I’ve got you  
17 sitting next to it.”
- 18 • “Nothing? Something happened, Nelson, she’s over there bleeding.”
- 19 • “Understand something: the only reason I’m over here is ‘cause Cheryl just ran across  
20 the fuckin’ back yard over here, banged on Phillip’s door, she’s bleeding all over the  
front fuckin’ porch, EMS is over there trying to patch her up . . . .”
- 21 • “I can’t figure out what the fuck happened; I don’t know if she got stabbed or she cut  
22 herself. You’re not being very helpful.”

1 (*Id.* at 22:24:30–22:30:15).

2 Although these questions and statements constitute interrogation while Defendant was in  
3 custody, the public-safety exception applies to the first portion of the officers' interrogation. Any  
4 reasonable officer would have believed there was a serious likelihood of harm to the public or  
5 themselves when they found Defendant's wife on the ground with a stab wound, followed tracks  
6 and drops of blood in the snow to Defendant's house, and saw blood at the base of the front door.  
7 When they knocked on the door, they did not know what had happened, whether a perpetrator  
8 might be lurking about the home, or whether weapons were in the area. During this emergency  
9 situation, the public-safety exception covers any questions the officers asked to determine what  
10 had happened and whether any ongoing threats to safety persisted.

11 The public-safety exception does not apply, however, once the emergency situation  
12 ended. After the officers entered Defendant's home, detained Defendant, searched the home for  
13 other individuals, and had custody of the knives, an emergency situation no longer existed. They  
14 knew the knives, one of which appeared to be bent and the other of which appeared to have  
15 blood on it, (Incident Report, 3), were likely used to harm Defendant's wife. The knives were in  
16 their control, and they knew no one else was in the house. At that point, the officers also acted  
17 without urgency, appearing to have no suspicion of any impending threat to safety.

18 Despite this change in circumstances, the officers continued to interrogate Defendant  
19 about what had happened and what role he played in the events, without informing him of his  
20 *Miranda* rights. They asked, for example:

- 21 • "You two didn't get in an argument?"  
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- 1 • “Did you cut her, or did she cut herself?”
- 2 • “What would he try and try you for this time? Why would he take you to court this
- 3 time?”

4 (Video, 22:26:40–22:26:50; 22:38:40–22:39:20). They also continued to make statements they  
5 knew could have elicited an incriminating response, such as “Cheryl’s over there bleeding; I’ve  
6 got a knife with blood all over it; I’ve got you sitting next to it,” and “I can’t figure out what the  
7 fuck happened; I don’t know if she got stabbed or she cut herself. You’re not being very  
8 helpful.” (*Id.* at 22:24:30; 22:30:09).

9 The public-safety exception does not cover any questions or statements the officers made  
10 after the emergency situation had ended. As a result, the Court must suppress any statements  
11 Defendant made in response to those questions and statements because the officers violated  
12 Defendant’s privilege against self-incrimination under the Fifth Amendment.

13 Defendant also argues his statements were given involuntarily because he was  
14 intoxicated. The body camera video clearly shows, and the officers reported, that Defendant was  
15 intoxicated during the interrogation. (*Id.* at 22:22:00–22:31:00; Incident Report, 6). Nevertheless,  
16 Defendant’s statements were the product of a rational intellect and free will. Defendant was able  
17 to follow the officers’ orders to sit down, stand up, and put his hands behind his back. (*Id.* at  
18 22:22:30–22:24:05). He provided cogent answers to their questions. For instance, when asked  
19 whether he cut his wife or she cut herself, he responded that she had cut herself. (*Id.* at 22:26:40–  
20 22:27:10). He also asked questions of the officers, such as what charges they were bringing  
21 against him, and whether he could get his shoes and sweatshirt. (*Id.* at 22:23:50; Body Camera  
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1 Video Two of Deputy Kyle Negus, DVD Bates No. USAO 00896, FILE0079, 22:42:20;  
2 22:43:05, ECF Nos. 40, 42). Although Defendant was intoxicated, his statements were the  
3 product of a rational intellect and free will; thus, his intoxication argument does not require the  
4 suppression of further statements.

5 Defendant was subject to custodial interrogation for purposes of *Miranda* within seconds  
6 after the officers entered his home. The public-safety exception applies to statements Defendant  
7 made before the officers restrained Defendant, took control of the knives, and did a sweep of the  
8 home. The Court grants in part the motion to suppress Defendant's statements under the Fifth  
9 Amendment. Any statements made after the emergency situation had ended are suppressed,  
10 whereas any statements made before that time are not.

11 **2. Statements Made in Jail in Humboldt County on January 1, 2015**

12 Defendant argues his statements made while in jail on January 1, 2015 should be  
13 suppressed because they were involuntary. Defendant infers that in exchange for his cooperation  
14 by answering questions from federal agents, he was promised no new tribal charges would be  
15 made against him. The Government argues this inference is speculative and the "fantasy and the  
16 product of his imagination." (Resp., 9–10, ECF No. 39). The Court agrees that the inference is  
17 highly speculative.

18 The record shows no evidence that officers promised Defendant that no new tribal  
19 charges would be made against him if he cooperated by answering their questions. According to  
20 the record, at 5:57 p.m. Defendant met with officers who read him his *Miranda* rights, and  
21 Defendant indicated that he understood them. (Tr. 2–3, ECF No. 39-3). Defendant then invoked  
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1 his right to have an attorney present. (*Id.* at 2). The interviewer immediately ceased the  
2 interrogation. (*Id.* at 3). At that point, Defendant had said nothing about the offense alleged  
3 against him or the events in question. (Special Agent Mike Spitzer, Hr’g, January 11, 2016,  
4 15:51:50–15:52:38). Defendant, however, “continued to ask questions about the circumstances  
5 of his arrest and [was] told that the interviewing Agents could not respond.” (Doc., 1, ECF No.  
6 39-4). At 6:18 p.m., Defendant stated he wanted to speak with the agents, and he confirmed that  
7 the agents did not ask to continue speaking with him once he had asked for an attorney. (Tr. 2,  
8 ECF No. 39-5). Defendant said he changed his mind. (*Id.*) The officers then re-read Defendant’s  
9 *Miranda* rights to him, and Defendant initialed and signed a waiver form. (*Id.* at 3; Waiver Form,  
10 ECF No. 39-5). The agents testified that at no point did they raise the subject of tribal charges or  
11 imply that if Defendant agreed to interview with them he would be let out of custody. (Spitzer,  
12 Hr’g, January 11, 2016, 15:52:40–15:53:03, 16:11:14; Ricco Rondeaux, Hr’g, January 11, 2016,  
13 16:19:14).

14 The officers scrupulously honored Defendant’s assertion of his right to cut off  
15 questioning. Defendant then waived that right by initiating of his own accord further  
16 communication with the officers and by soliciting information from them. On the record, he  
17 admitted the officers did not initiate the renewed conversation. Defendant’s inference that he was  
18 induced to waive his rights by a promise of no further tribal charges is not supported by any facts  
19 or evidence presented. In fact, the interviewing agents specifically testified they did not discuss  
20 tribal charges with Defendant. Defendant’s waiver of his rights was voluntary, knowing, and  
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1 intelligent. The Court denies the motion to suppress Defendant's statements made in jail on  
2 January 1, 2015.

3 Defendant's motion to suppress evidence under the Fifth Amendment is granted as  
4 pertaining to statements made in his home after the officers had detained him and searched his  
5 home; however, the motion is denied as pertaining to statements made before that time, and also  
6 while Defendant was in jail in Humboldt County on January 1, 2015.

### 7 **VIII. MOTION TO SUPPRESS EVIDENCE**

8 Defendant moves to suppress certain evidence seized in his home on December 31, 2014  
9 and January 1, 2015 (ECF No. 22). He argues officers entered his home, searched it, and seized  
10 evidence in violation of the Fourth Amendment. Defendant asks the Court to suppress the  
11 following items, and any forensic testing resulting from them, as fruits of an illegal search: two  
12 kitchen knives; one pair of white socks; one pink blanket; fourteen papers with handwriting;  
13 swabs of the kitchen floor and the threshold of the front door; color photographs taken inside the  
14 home; observations made or captured by agents in the home; and the custodial interrogation  
15 conducted in the home. The Court denies the motion.

#### 16 **A. Search and Seizure**

17 Evidence obtained by the Government in violation of the Fourth Amendment is generally  
18 inadmissible against an accused in a federal criminal trial. *Weeks v. United States*, 232 U.S. 383,  
19 393–99 (1914). Before searching a person's home, the Government must obtain a search warrant  
20 based on probable cause and issued by a neutral and detached magistrate; warrantless home  
21 searches are presumptively unreasonable. *See* U.S. Const. amend. IV; *Payton v. New York*, 445  
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1 U.S. 573, 586 (1980). However, a warrantless search of a home can be permissible under “a  
2 narrow set of rigorously guarded exceptions.” *United States v. Stafford*, 416 F.3d 1068, 1073  
3 (9th Cir. 2005). These exceptions include voluntary consent, the emergency doctrine, and exigent  
4 circumstances.

5 **1. Voluntary Consent**

6 Warrantless searches can be valid “with the voluntary consent of an individual possessing  
7 authority.” *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (citations omitted). To prove  
8 voluntary consent, the Government must prove a defendant gave ““unequivocal and specific””  
9 consent and that it was given ““freely and intelligently.”” *United States v. Shaibu*, 920 F.2d 1423,  
10 1426 (9th Cir. 1990) (quoting *United States v. Page*, 302 F.2d 81, 83–84 (9th Cir. 1962)). In  
11 “very limited circumstances . . . courts will infer consent from the cooperative attitude of a  
12 defendant,” *United States v. Impink*, 728 F.2d 1228, 1232 (9th Cir. 1984), but the Government’s  
13 burden of proof “is heavier where consent is not explicit, since consent ‘is not lightly to be  
14 inferred,’” *id.* (quoting *United States v. Patacchia*, 602 F.2d 218, 219 (9th Cir. 1979)). Whether  
15 consent was given is based on the totality of the circumstances. *Id.* at 1234 (citing *Schneckloth v.*  
16 *Bustamonte*, 412 U.S. 218, 227 (1973)).

17 Defendant argues he did not consent to the officers’ entry into his home. Specifically, he  
18 relies on *Shaibu* and *United States v. Albrektzen*, 151 F.3d 951, 956 (9th Cir. 1998), to argue he  
19 did not give implied consent to enter his home. In *Shaibu*, the defendant did not consent to enter  
20 his home when he walked into his house, leaving the door open, and police followed him inside  
21 without requesting permission to enter. 920 F.2d at 1424. The court held that “in the absence of a  
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1 specific request by police for permission to enter a home, a defendant's failure to object to such  
2 entry is not sufficient to establish free and voluntary consent. We will not infer both the request  
3 and the consent." *Id.* at 1428. In *Albrechtsen*, the defendant did not consent to the officers' entry  
4 when the defendant moved aside to avoid being knocked down by the officers. 151 F.3d at 955.  
5 In contrast, in *United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993), "the officers tricked  
6 Garcia into opening the door, grabbed the door, flashed a badge and said, 'we'd like to talk to  
7 you.' Garcia said, 'okay,' nodded and stepped back." *Id.* at 1281. The Ninth Circuit found that  
8 "the officers' request to talk, combined with Garcia's affirmative response and step back clearing  
9 the way for the officers' entry are sufficient to give rise to an inference of consent." *Id.*

10 The Court finds that Defendant consented to the officers' entrance into his home. The  
11 body camera video shows the officers knocked on the door several times, and then Defendant  
12 opened the door. (Video, 22:21:20–22:22:05). At the door, Officer Manard asked Defendant,  
13 "What's going on?" and "Why is Cheryl bleeding?" (*Id.* at 22:22:05). Deputy Kyle Negus, the  
14 officer with the body camera, was not on the porch but asked with a slightly raised voice, "Can  
15 we come in the house?" (*Id.* at 22:22:15). Shortly after Deputy Negus's question, Officer Manard  
16 said something to Defendant, but his voice is muffled and barely audible. (*Id.*). Deputy Kyle  
17 Negus then walked to the side of the house, which caused Defendant's voice to become  
18 inaudible, and the voices of the other officers remained quieter and muffled. (*Id.* at 22:22:20–  
19 22:22:30). When the door becomes visible again in the video, the other officers are entering the  
20 house after Defendant has already returned to the interior of his home. (*Id.* at 22:22:30). Thus,  
21 the body camera video does not show definitively whether Officer Manard requested  
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1 Defendant's consent to enter or whether Defendant verbally or physically consented to the  
2 officers' entrance.

3 The officers' reports provide more information about what occurred. According to a  
4 report by Deputy Kyle Negus, "I then asked if we could come in the house and a few seconds  
5 later Officer Manard asked if we could come in. Officer Manard entered the home followed by  
6 Deputy Casey Negus." (Narrative, 4, ECF No. 41-1). Officer Manard reported, "I then asked if I,  
7 along with the two deputies, could enter his residence and he invited us inside." (Incident Report,  
8 3, ECF No. 41-2). In addition, the following testimony was given during an evidentiary hearing:

- 9 • "I heard Officer Manard ask if we can come in the house." (Deputy Kyle Negus, Hr'g,  
10 January 11, 2016, 14:12:45);
- 11 • "I did ask if I could come inside of the home." (Officer Manard, *id.* at 14:49:48);
- 12 • "Kyle Negus asked if we could come inside followed by Officer Manard asking  
13 [Defendant] if we could come inside." (Deputy Casey Negus, *id.* at 15:26:02).

14 Exactly how Defendant responded is unclear. Officer Manard testified that Defendant replied by  
15 saying "something to the effect of 'come on in.'" (*Id.* at 14:50:53). Deputy Kyle Negus could not  
16 hear Defendant's response from where he was standing. (*Id.* at 14:12:55). Deputy Casey Negus  
17 testified at first that he could not recall whether Defendant responded to Manard's request to  
18 enter, (*id.* at 15:26:10), but later he stated that "Defendant said something," which Negus did not  
19 understand, and then "[Defendant] invited us in, (*id.* at 15:35:07–15:41:50). After saying  
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1 whatever he said, Defendant turned away and walked into his home.<sup>2</sup> Also, Defendant, not the  
2 officers, opened the door after the officers knocked and the door stayed open until the officers  
3 entered Defendant's home.<sup>3</sup>

4 The Court finds that, despite any minor discrepancies in the record, Deputy Kyle Negus  
5 and Officer Manard both asked Defendant if the officers could enter Defendant's home.  
6 Defendant then likely orally consented to their entry, turned around, and returned into his house.  
7 The officers then followed Defendant through the open door. The Court finds no reason to  
8 disbelieve Officer Manard's testimony that he asked for consent to enter Defendant's home and  
9 that Defendant responded affirmatively by saying something and returning into his home. The  
10 video does not show conclusively that Defendant consented, but it also does not show he did not  
11 consent. While Deputy Kyle Negus was on the side of the house, a muffled discussion or  
12 statement occurred on the porch during which Defendant could have given consent to enter.

13 The cases Defendant cites do not support his argument. In *Shaibu*, the Ninth Circuit held  
14 that "in the absence of a specific request by police for permission to enter a home, a defendant's  
15 failure to object to such entry is not sufficient to establish free and voluntary consent." 920 F.2d  
16 at 1424. Here, two officers requested entrance into Defendant's home. In *Albrektsen*, the  
17 defendant did not consent to the officers' entry when the defendant moved aside to avoid being

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18 <sup>2</sup> Officer Manard: "Yes, he did turn away from me and began walking back into the home. . . . I  
19 followed [Defendant] into the home." (*Id.* at 14:50:48). Deputy Casey Negus: "[Defendant]  
20 stepped to the side, and we followed [Defendant] into the residence." (*Id.* at 15:26:22);  
21 "[Defendant], when he was asked if we could come in, he said something to Officer Manard and  
22 turned away and let us into the home." (*Id.* at 15:40:27).

21 <sup>3</sup> Officer Manard: "I believe [Defendant] opened the door." (*Id.* at 15:12:25). Deputy Casey  
22 Negus: "[Defendant] opened the door, and the door stayed open as we entered the home." (*Id.* at  
23 15:38:53).

1 knocked down by the officers. 151 F.3d at 955. Here, in contrast, Defendant clearly did not move  
2 aside to avoid contact with the officers—he left the doorway, and the officers followed him into  
3 his home. Finally, in *Garcia*, “the officers’ request to talk, combined with Garcia’s affirmative  
4 response and step back clearing the way for the officers’ entry [were] sufficient to give rise to an  
5 inference of consent.” 997 F.2d at 1281. Here, as in *Garcia*, the officers requested to enter,  
6 Defendant cleared the way for them to do so, and Officer Manard reported that Defendant invited  
7 them in. Based on case law and the facts, the Court finds that Defendant consented to the  
8 officers’ entry into his home.

9 Defendant argues his consent was involuntary because he was too intoxicated to consent.  
10 Intoxication does not automatically render consent involuntary; it can be manifest in varying  
11 degrees and is one factor to consider among the totality of the circumstances. *United States v.*  
12 *Koshnevis*, 979 F.2d 691, 694 (9th Cir. 1992) (rejecting the defendant’s claim he was too  
13 intoxicated to consent when he “appeared alert and cooperative” and was “clear-minded enough  
14 to construct several lies”); *see also United States v. Gay*, 774 F.2d 368, 376–77 (10th Cir. 1985)  
15 (citing cases from other circuits finding that intoxication has varying degrees and does not alone  
16 render consent invalid).

17 Defendant’s intoxicated state did not render his consent involuntary. In *Gay*, the  
18 defendant voluntarily consented to a search even though “he staggered and swayed, he used the  
19 vehicle to support himself, and his speech was slurred” because he was able to answer questions,  
20 produce his driver’s license, and empty his pockets upon request. 774 F.2d at 376–77. Here,  
21 although Defendant was clearly intoxicated, he was able to open the door, converse with the  
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1 officers, allow them to enter, and obey their orders. Defendant's choice to allow the officers to  
2 enter his home was given freely and intelligently and was the product of a rational intellect and  
3 free will. Defendant has presented no evidence to show otherwise.

## 4       2.       **Emergency Exception**

5       Even if Defendant did not consent to the officers' entry into his home, the emergency  
6 exception allowed the officers to enter his home without a warrant or his consent. Because of law  
7 enforcement officers' role as community caretakers, "[t]he emergency doctrine allows [them] to  
8 enter and secure premises without a warrant when they are responding to a perceived  
9 emergency." *United States v. Stafford*, 416 F.3d 1068, 1073 (9th Cir. 2005). In *Stafford*, the  
10 Ninth Circuit determined that under the emergency doctrine, a warrantless search is justified if  
11 the following three requirements are satisfied:

12       (1) The police must have reasonable grounds to believe that there is an emergency  
13 at hand and an immediate need for their assistance for the protection of life or  
14 property.

15       (2) The search must not be primarily motivated by intent to arrest and seize  
16 evidence.

17       (3) There must be some reasonable basis, approximating probable cause, to  
18 associate the emergency with the area or place to be searched.

19 *Id.* at 1073–74 (quoting *United States v. Cervantes*, 219 F.3d 882, 888 (9th Cir. 2000)).

20 However, in *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006), the Supreme Court abrogated  
21 the second prong of the test. See *Hopkins v. Bonvicino*, 573 F.3d 752, 763 (9th Cir. 2009).

22 According to the Court, "[t]he officer's subjective motivation is irrelevant." *Brigham City*, 547  
23 U.S. at 404. Instead, "[a]n action is 'reasonable' . . . 'as long as the circumstances, viewed  
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1 objectively, justify [the] action.” *Id.* (emphasis in original) (quoting *Scott v. United States*, 436  
2 U.S. 128, 138 (1978)). Further, although a homicide scene alone does not create an emergency  
3 situation that justifies a warrantless search, “when the police come upon the scene of a homicide  
4 they may make a prompt warrantless search of the area to see if there are other victims or if a  
5 killer is still on the premises.” *Mincey v. Arizona*, 437 U.S. 385, 392 (1978); *see also Thompson*  
6 *v. Louisiana*, 469 U.S. 17 (1984) (affirming *Mincey*). The analysis for the emergency exception  
7 is based on the totality of the circumstances, and the Government bears the burden of  
8 demonstrating the exception applies. *Stafford*, 416 F.3d at 1074.

9       The emergency exception applies to the officers’ entry and search of Defendant’s home.  
10 A reasonable officer in the circumstances would have grounds to believe an ongoing emergency  
11 required assistance to protect life or property. When the officers arrived on the scene, they found  
12 Defendant’s wife on the ground flailing, moaning, and unresponsive, apparently having been  
13 stabbed. (Incident Report, 3; Video, 22:16:20). They decided to check on Defendant at his home,  
14 which was about eighty yards away. (Narrative, 4, 6). They followed a trail of fresh foot prints in  
15 the snow and noticed drops of blood in the snow next to an open gate. (*Id.*; Incident Report, 3).  
16 At Defendant’s house, they noticed blood in the door way. (Incident Report, 3). As they knocked  
17 on the door, the officers did not know whether Defendant’s wife had stabbed herself or someone  
18 else had done it. They did not know where the weapon used to stab her was located. After  
19 Defendant opened the door, the officers would have reasonably expected someone else to be in  
20 the house after Officer Kyle Negus observed, “[S]omeone’s fuckin’ around by this window.”  
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1 (Video, 22:21:52).<sup>4</sup> A reasonable officer would have viewed these circumstances as an  
2 emergency situation. He or she would have been concerned that a killer or other victims were in  
3 the house, particularly after Defendant opened the door in an intoxicated state and insisted that  
4 “[n]othing” had happened.<sup>5</sup> (Video, 22:22:06). As a result, the officers were justified in doing a  
5 prompt warrantless search of the home to determine if a killer occupied the house or if other  
6 victims were present.

7 During the evidentiary hearing, Defendant relied on *United States v. Dugger*, 603 F.2d 97  
8 (9th Cir. 1979), to argue the emergency exception does not apply. In *Dugger*, officers arrived at  
9 an apartment complex where they interviewed the victim of an alleged assault resulting from a  
10 fistfight. *Id.* at 98. They then followed a trail of blood from the victim to the defendant’s  
11 apartment where they observed blood on the front door. *Id.* After ringing the doorbell and  
12 hearing no response, an officer pushed the door open, stepped back, and called to the defendant.  
13 *Id.* After a moment, a male in the apartment said he would put his shoes on and come right out.  
14 *Id.* The court held that “once the officers heard Dugger respond from within that he was coming  
15 outside as soon as he put on his shoes, any excuse of an emergency dissipated.” *Id.* at 99–100.  
16 The court also noted that no evidence indicated that the victim or another individual “told the  
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18 <sup>4</sup> During the evidentiary hearing, Deputy Kyle Negus testified: “I noticed someone moving the  
19 blinds at the window facing on the south side of the house.” (Hr’g, January 11, 2016, 14:11:12–  
14:11:20).

20 <sup>5</sup> Defendant could argue the officers were intent on finding him, suspecting him as the  
21 perpetrator of the stabbing, and, thus, they entered and searched his home with the intent to find  
22 evidence that he committed the crime rather than to do a cursory search for a killer or other  
23 victims; however, “[t]he officer’s subjective motivation is irrelevant.” *Brigham City*, 547 U.S. at  
24 404.

1 officers that Dugger was armed or injured or that any other persons were injured in the fight.” *Id.*  
2 at 100, n.5.

3       *Dugger* and this case have similarities. As in *Dugger*, the officers here followed a trail of  
4 evidence (blood drops and foot prints) to Defendant’s house and then were able to speak with  
5 Defendant. However, the cases are different in four important aspects. First, *Dugger* involved an  
6 assault whereas this case involves a stabbing and murder. The officers here knew the victim had  
7 been stabbed in the chest and could soon die. She was flailing and moaning and was  
8 unresponsive. A stabbing resulting in death creates a much more serious emergency situation  
9 than an assault resulting from a fistfight. As *Mincey* indicated, a homicide scene justifies “a  
10 prompt warrantless search of the area to see if there are other victims or if a killer is still on the  
11 premises.” 437 U.S. at 392. Second, although the officers were speaking with Defendant at the  
12 door and knew he was not in need of immediate aid, they knew that “someone [was] fuckin’  
13 around by th[e] window,” (Video, 22:21:52), and, thus, that a person other than Defendant might  
14 have been inside. In *Dugger*, no evidence indicated that another person could be inside. Third,  
15 the defendant in *Dugger* simply said he would put his shoes on and come outside, whereas here  
16 Defendant said “nothing” had happened, which would have done little or nothing to dissipate the  
17 emergency situation resulting from a stabbing. Fourth, in *Dugger* the officers were able to  
18 interview the victim, and no evidence indicated that the defendant was armed or injured or that  
19 other individuals were injured. Here, in contrast, the victim was unresponsive and, therefore,  
20 unable to tell the officers what had happened. She provided no information to help dissipate the  
21 emergency situation. The officers did know that at least one person had been stabbed using a  
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1 weapon they had not yet located, and that the victim had come from Defendant's home. Thus,  
2 when the officers knocked on the door of Defendant's home, the emergency situation was  
3 ongoing and more serious than the situation in *Dugger*. In contrast to the situation in *Dugger*, the  
4 emergency situation here justified a prompt warrantless search of Defendant's home.

5 The initial cursory search of Defendant's home was also appropriate. Once inside  
6 Defendant's house, the officers found the two knives, questioned Defendant about whether  
7 anyone else was in the house and what had happened, and performed a prompt search of the  
8 house. In *Thompson*, officers responded to a report of homicide and performed a cursory search  
9 of the home. 469 U.S. at 18. Thirty-five minutes later, two investigators arrived to conduct a  
10 follow-up investigation of the homicide, which involved a two-hour "general exploratory search  
11 for evidence of a crime." *Id.* (internal quotations omitted). According to the Court, the initial  
12 cursory search was reasonable, whereas the officers should have obtained a warrant before  
13 conducting the in-depth investigatory search. *Id.* at 18–19. Here, the officers' search was  
14 comparable to the cursory search in *Thompson*. Knowing a person had likely been stabbed but  
15 not knowing who did it, they performed a prompt search of the home, presumably to see whether  
16 a killer or other victims were present. While assessing the emergency situation, the officers did  
17 not meticulously search the home for evidence of a crime. Their search was limited to addressing  
18 the emergency situation at hand. The officers had reasonable grounds for conducting a prompt,  
19 warrantless search of Defendant's home because of the ongoing emergency situation.

20 Finally, the officers had a reasonable basis for associating the emergency with  
21 Defendant's home. As noted, the officers noticed a set of fresh foot prints in the snow between  
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1 the scene and Defendant's home. (Narrative, 4, 6; Incident Report, 3). They also saw drops of  
2 blood in the snow near an open gate between the houses and blood on the door frame of  
3 Defendant's home. (*Id.*). Based on this evidence, any reasonable officer would find probable  
4 cause to connect the emergency with Defendant's home. As a result, the emergency exception  
5 applies to the officers' search of Defendant's home.

### 6 3. Scope of the Search

7 Although the emergency situation justified the officers' entry into Defendant's home and  
8 a cursory search of it, their search of papers on the table in Defendant's home exceeded the scope  
9 of a reasonable search. Even when the emergency exception justifies entry into a home, officers  
10 may only "seize any evidence that is in plain view during the course of their legitimate  
11 emergency activities." *Mincey*, 437 U.S. at 393. Indeed, "a warrantless search must be 'strictly  
12 circumscribed by the exigencies which justify its initiation.'" *Id.* (quoting *Terry v. Ohio*, 392  
13 U.S. 1, 25–26 (1968)). "To fall within the plain view exception, two requirements must be met:  
14 the officers must be lawfully searching the area where the evidence is found and the  
15 incriminatory nature of the evidence must be immediately apparent." *Stafford*, 416 F.3d at 1076  
16 (quoting *Roe v. Sherry*, 91 F.3d 1270, 1272 (9th Cir. 1996)); see also *Minnesota v. Dickerson*,  
17 508 U.S. 366, 375 (1993). "The second requirement . . . focuses on whether the officers had  
18 'probable cause to believe they were associated with criminal activity.'" *Id.* (quoting *Horton v.*  
19 *California*, 496 U.S. 128, 131, n.1 (1990)).

20 Here, the first requirement is satisfied because the officers lawfully entered Defendant's  
21 home based on the emergency exception. However, the incriminatory nature of papers resting on  
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1 a table is not immediately apparent. The officers could not have known whether the papers  
2 contained incriminating evidence simply by glancing at them during a cursory search.  
3 Furthermore, searching the papers had no relation to searching the house for victims, a killer, or  
4 weapons. Thus, the officers' search of the papers exceeded the scope of the plain view exception.

5 The inevitable discovery doctrine excuses the search of the papers. The inevitable  
6 discovery doctrine is an exception to the exclusionary rule of the Fourth Amendment. *Nix v.*  
7 *Williams*, 467 U.S. 431, 440-41 (1984). Under this doctrine, "if the government can establish by  
8 a preponderance of the evidence that the unlawfully obtained information 'ultimately or  
9 inevitably would have been discovered by lawful means,' the exclusionary rule will not apply."  
10 *United States v. Camou*, 773 F.3d 932, 943 (9th Cir. 2014) (quoting *Nix*, 467 U.S. at 444).

11 Here, the Government inevitably would have discovered the papers if the warrantless  
12 search had not occurred. Following Defendant's arrest, the officers secured the property and  
13 established it as a crime scene. (Incident Report, 4). The next day, the FBI obtained a search  
14 warrant, (Warrant Appl., 11-18, ECF No. 22-1), searched Defendant's house, and seized the  
15 papers, among other items. (Mot. to Suppress, 2, ECF No. 22). Nothing would have prevented  
16 the Government from searching Defendant's home the next day and seizing the papers.

17 Defendant argues the Government would not have inevitably discovered the papers  
18 because the warrant application contained tainted evidence. "The mere inclusion of tainted  
19 evidence in an affidavit does not, by itself, taint the warrant or the evidence seized pursuant to  
20 the warrant," *United States v. Vasey*, 834 F.2d 782, 788 (9th Cir. 1987), but "[a] reviewing court  
21 should excise the tainted evidence and determine whether the remaining, untainted evidence  
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1 would provide a neutral magistrate with probable cause to issue a warrant.” *Id.* Here, the papers  
2 were the only tainted evidence obtained. The warrant application does not mention the papers  
3 other than to request their seizure. (Warrant Appl., 18). Thus, excising the papers from the  
4 application would not diminish probable cause to issue a warrant. Defendant also argues the  
5 account in the affidavit supporting the warrant application misrepresents what actually occurred;  
6 however, after examining the body camera video and the officers’ accounts of what occurred, the  
7 assertions in the affidavit, even if imperfect, presented a reasonably accurate summary of the  
8 events that transpired.

9 In summary, Defendant consented to the officers’ entrance into his home, and even if he  
10 did not, the emergency exception allowed the officers to enter his home without a warrant or his  
11 consent. Although the officers’ search of the papers exceeded the scope of the plain view  
12 exception, the Government inevitably would have discovered the papers during its legal,  
13 warrant-based search the following day. As a result, the papers and all other evidence seized in  
14 Defendant’s home were not the fruit of an illegal search and are admissible at trial.

#### 15 4. Exigent Circumstances

16 Relying on the emergency exception, the Government only briefly refers to the exigent  
17 circumstances exception. The Court need not address the exigent circumstances exception  
18 because Defendant consented to the search, or, alternatively, the emergency exception applies.

19 The Court denies the motion.

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**CONCLUSION**

IT IS HEREBY ORDERED that Defendant's Motion to Require Introduction of Evidence Under 404(b) (ECF No. 15) is GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion to Order the United States to Inspect and Produce the Personnel Files of Federal Law Enforcement Officers and Task Force Officers (ECF No. 16) is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that Defendant's Motion to Strike Surplusage from the Indictment (ECF No. 17) is GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion to Use the Elko Division Master Jury Wheel (ECF No. 18) is GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion to Permit Attorneys to Ask Further Questions of Jurors Under Rule 24(a) (ECF No. 19) is DENIED.

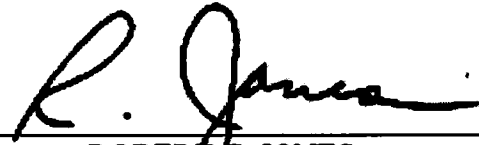
IT IS FURTHER ORDERED that Defendant's Motion to Use a Case-specific Jury Questionnaire (ECF No. 20) is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion to Suppress Statements for Fifth Amendment Violations (ECF No. 21) is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that the Motion to Suppress Evidence for Fourth Amendment Violations (ECF No. 22) is DENIED.

IT IS SO ORDERED.

1 Dated this 28th day of January, 2016.

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7 ROBERT C. JONES  
8 United States District Judge  
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